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IN THE SUPREME COURT OF MISSOURI

No. SC83747

CHESTERFIELD VILLAGE, INC.,

Appellant,

vs.

CITY OF CHESTERFIELD, MISSOURI,

Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri

Division No. 14

Honorable James R. Hartenbach, Judge

SUBSTITUTE BRIEF OF RESPONDENT CITY OF CHESTERFIELD, MISSOURI

JURISDICTIONAL STATEMENT

Respondent City of Chesterfield, Missouri (the ACity@) adopts the Jurisdictional Statement in the Substitute Brief of Appellant Chesterfield Village, Inc. (AChesterfield Village@), except to the extent that the Jurisdictional Statement characterizes Chesterfield Village=s pleadings and purported causes of action in the Circuit Court.

STATEMENT OF FACTS

The Respondent City of Chesterfield considers the "Statement of Facts" sections of the Supplemental Brief of Appellant Chesterfield Village and, in particular, of the Brief *Amicus Curiae* of Pacific Legal Foundation, to contain argument in violation of Missouri Supreme Court Rule 84.04(c). The City has therefore prepared its own Statement of Facts for this Substitute Brief.

In 1994 Chesterfield Village and its individual owners, Louis and Nancy Sachs, petitioned the City of Chesterfield to rezone a 46.3 acre tract of land which they owned at that time. (L.F. 23, & 23.) The tract, which is located west of the intersection of Wild Horse Creek Road and Baxter Road in St. Louis County, Missouri, had been zoned "NU" (Non-Urban) since long prior to the incorporation of the City on June 1, 1988. (L.F. 6, & 6; L.F. 21, && 6, 8-10.)

"NU" zoning, which authorized residential use for single-family homes on lots of three or more acres, would have permitted Chesterfield Village to develop 15 homes on the tract. Chesterfield Village requested the City to change the zoning of the tract in order to obtain it an "R-3" classification, which would allow the development of 114 homes on lots of 10,000 square feet apiece. (L.F. 6, && 9-10.) The City=s Planning Department and Planning Commission recommended approval of the proposed rezoning, but the petition eventually failed to pass in the City Council because it did not obtain the supermajority required by Section 89.060, R.S.Mo. (L.F. 23, && 24-25; L.F. 47, & 10.)

Chesterfield Village and the Sachses then sued the City in the Circuit Court of St. Louis County over the refusal to rezone the tract. On April 6, 1996, in consolidated Cause No. 673678 (including Cause No. 675787), the Circuit Court entered a judgment finding the "NU@ zoning illegal, null and void because it was "arbitrary, capricious and unreasonable@ and "violative of the rights of Chesterfield Village, Inc. to due process under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 10 of the Missouri Constitution.@ (L.F. 20-27, && 9.) The Circuit Court ordered the City to place "a reasonable zoning classification@ on the tract. (L.F. 27.)

Neither party appealed the Circuit Court=s April 6, 1996 judgment, and in May and June 1996 the City Council, after negotiation with Chesterfield Village, passed ordinances rezoning the tract to a residential classification with a planned environmental unit ("PEU@), which were similar but not identical to the original zoning reclassification Chesterfield Village and the Sachses had sought in 1994. (L.F. 9-10, && 29-35; L.F. 12-13, && 44-45; L.F. 28-45; L.F. 48-49, && 34-35; L.F. 78, & 34.)

Development of the tract then proceeded under the new zoning. In May 1997 Chesterfield Village and the Sachses sold the tract to Taylor-Morley, Inc., an unrelated corporation which had not been a party to consolidated Cause No. 673678 and is not a party to this case. Thereafter, in December 1997, the Sachses executed an assignment document, purporting to assign to Chesterfield Village their own causes of action and claims against the City with regard to the tract. (L.F. 5-6, && 4-5; L.F. 12-13, && 44-45; L.F. 68-69, 97.)

On June 11, 1999, Chesterfield Village returned to the Circuit Court of St. Louis County and filed the present action, seeking declaratory relief, compensatory damages, attorneys= fees and costs against the City. Its First Amended Petition, filed on February 1, 2000, was in three counts. (L.F. 1, 2, 5-45.)

Count I, entitled ATemporary Taking,@ sought declaratory relief, damages, attorneys= fees and costs on the theory that the City=s earlier Arefusal to rezone@ the tract amounted to a Atemporary regulatory taking of, and a damage to, the property of Chesterfield Village and the Sachs for public use without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 26 and 28 of the Missouri Constitution.@ (L.F. 11, 12, & 43.) While the general allegations of the First Amended Petition included the statement that ANU@ zoning classification would have allowed up to A15 homes to be built on the 46.3 acre tract@ (L.F. 6, & 10), Chesterfield Village also alleged in Count I that:

> AChesterfield Village and the Sachs were unable to beneficially use the tract because Chesterfield=s >NU= zoning classification for the tract was a legally imposed restriction upon the property=s use.@ (L.F. 12, & 40.)
>
> AChesterfield Village and the Sachs were deprived of all economically beneficial or productive use of the tract ... as it was not economically feasible to develop the tract under the NU classification, and Chesterfield Village was thereby forced to leave the tract economically idle.@ (L.F. 12, & 41.)

ABased on its actions, Chesterfield prevented Chesterfield Village and the Sachs from developing the tract and thereby restricted the reasonable, viable and economically feasible use of the tract so as to damage Chesterfield Village and the Sachs= property rights and deny Chesterfield Village and the Sachs their reasonable and distinct investment-backed expectations.@ (L.F. 12, && 42.)

Count II, entitled AInverse Condemnation,@ sought declaratory relief, damages, attorneys= fees and costs for Ainverse condemnation@ of the tract, on the theory that the original refusal to rezone Aconstituted a taking of, and a damage to, the property of Chesterfield Village and the Sachs for public use without just compensation@ and Aan invasion and/or appropriation of Chesterfield Village and the Sachs= valuable property rights and its legal and proper right to use and develop its property.@ (L.F. 14-15, && 54-55.) It called the City=s actions Aa taking from the time the rezoning Petition for a change in zoning was filed on July 11, 1994 until sometime after Chesterfield adopted Ordinances Nos. 1173 and 1174 on June 17, 1996 when Chesterfield Village and the Sachs were able to take the necessary steps to place the 46.3 acre tract on the market for development.@ (L.F. 15, &57.)

Count III, entitled ADeprivation of Rights Under Color of Law / 42 U.S.C. ' 1983 -- Just Compensation,@ sought damages, attorneys= fees and costs under 42 U.S.C. '' 1983 and 1988 on the theory that the City=s Arefusal to rezone and the resulting temporary regulatory taking@ of the tract were Aunder color of state law@ and deprived Chesterfield Village of Aa right, privilege or immunity secured by the Constitution@ of the United States, the Aright to

just compensation for the taking of private property for public use secured to it by the Fifth and Fourteenth Amendments to the United States Constitution.@ (L.F. 16-17, && 64-66.) It also alleged both that AChesterfield=s refusal to rezone the tract and its retention of the NU classification thwarted Chesterfield Village and the Sachs= legitimate expectations that they would be able to economically develop the tract for residential purposes@ and that AChesterfield=s actions denied Chesterfield Village and the Sachs all economically viable use of the tract.@ (L.F. 16, && 62-63.)

In both Count I and Count II, but not in Count III, Chesterfield Village alleged that its damages for the alleged taking Awere unascertainable until such time as the Court invalidated the NU classification as applied to the tract and Chesterfield passed an ordinance rezoning the tract to a reasonable classification.@ (L.F. 13, & 47; L.F. 15, & 59.) In all three Counts it prayed for damages Ain an amount to be determined at trial but in excess of $1,000,000.00.@ (L.F. 13, 16, 17.)

In response to the First Amended Petition, the City moved on May 17, 2000, to dismiss the action, on the grounds that:

> A(1) Plaintiff=s Petition and all three Counts thereof fail to state a claim upon which relief can be granted.
>
> (2) Plaintiff=s Petition shows on its face that Plaintiff lacks standing to sue on any of its three Counts.
>
> (3) Plaintiff=s Petition shows on its face that all three of its Counts are barred by the principles of *res judicata* and collateral estoppel.

(4) Plaintiff=s Petition shows on its face that its prayer for attorneys= fees, or [*sic*; the word Aor@ should have been Ais@] in truth a request for punitive damages.@ (L.F. 2, 61.)

On August 16, 2000, after argument on the Motion to Dismiss, the Circuit Court sustained it and dismissed the action outright. (L.F. 108.) Chesterfield Village filed a AMotion to Reconsider Dismissal or, Alternatively, Motion to Amend Order@ (L.F. 109-114), leading the Circuit Court to enter a new AAmended Order and Judgment@ specifying that it was sustaining the Motion to Dismiss Afor the reason that Plaintiff=s Petition failed to state a claim upon which relief could be granted.@ (L.F. 115.)

Chesterfield Village appealed to the Missouri Court of Appeals, Eastern District, which filed an opinion on May 9, 2001, reversing the decision of the Circuit Court and remanding the case for further proceedings. After the Court of Appeals denied the City=s timely filed Motion for Rehearing or, in the Alternative, for Transfer to the Supreme Court of Missouri, the City filed its Application for Transfer to the Supreme Court of Missouri, which this Court granted on August 21, 2001. The case is now to be heard and determined as on original appeal, pursuant to Missouri Supreme Court Rule 83.09.

POINTS RELIED ON

(a) STANDARD OF REVIEW ON ALL POINTS

THE TRIAL COURT=S DECISION GRANTING A MOTION TO DISMISS THE PLAINTIFF=S PETITION SHOULD BE SUSTAINED ON ANY GROUND WHICH SUPPORTS THE MOTION, ABSENT AN ABUSE OF DISCRETION OR AN ERRONEOUS DECLARATION OR APPLICATION OF THE LAW, WHILE TESTING ONLY THE SUFFICIENCY OF THE PETITION, GRANTING ITS BROADEST INTENDMENT, ASSUMING THAT ALL ITS FACTUAL AVERMENTS ARE TRUE, AND CONSTRUING IT LIBERALLY AND FAVORABLY TO THE PLAINTIFF TO DETERMINE WHETHER ITS AVERMENTS INVOKE PRINCIPLES OF SUBSTANTIVE LAW ENTITLING THE PLAINTIFF TO RELIEF.

Farm Bureau Town and Country Insurance Company of Missouri v. Angoff, 909 S.W.2d 348 (Mo. banc 1995)

Tolliver v. Standard Oil Company, 431 S.W.2d 159 (Mo. 1968)

St. Charles County v. City of O=Fallon, 972 S.W.2d 327 (Mo.App.E.D. 1998)

City of Chesterfield v. DeShetler Homes, Inc., 938 S.W.2d 671 (Mo.App.E.D. 1997)

I

THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN DISMISSING COUNT I OF THE FIRST AMENDED PETITION, WHICH ALLEGED THAT THE CITY=S FAILURE TO REZONE THE SUBJECT PROPERTY EFFECTED A TEMPORARY REGULATORY TAKING WITHOUT JUST COMPENSATION, IN THAT MISSOURI LAW RECOGNIZES NO SUCH CAUSE OF ACTION BASED ON MERE GOVERNMENTAL *INACTION* IN ZONING WHICH DID NOT DEPRIVE CHESTERFIELD VILLAGE OF ALL USE AND ECONOMIC VALUE OF ITS PROPERTY, AND CHESTERFIELD VILLAGE FAILED TO PLEAD FACTS UPON WHICH RELIEF COULD BE GRANTED.

Marvin E. Nieberg Real Estate Company v. St. Louis County, 488 S.W.2d 626 (Mo. 1973)

Palazzolo v. Rhode Island, ___ U.S. ___, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001)

First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987)

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)

Constitution of the United States, Amendment V

Constitution of the United States, Amendment XIV

Constitution of Missouri, Article I, Section 10

Constitution of Missouri, Article I, Section 26

Section 89.060, R.S.Mo.

II

THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN DISMISSING COUNT II OF THE FIRST AMENDED PETITION, WHICH ALLEGED THAT THE CITY=S FAILURE TO REZONE THE SUBJECT PROPERTY RESULTED IN AN INVERSE CONDEMNATION WITHOUT JUST COMPENSATION, IN THAT NEITHER ARTICLE I, SECTION 26 OF THE MISSOURI CONSTITUTION NOR ANY OTHER PROVISION OF LAW RECOGNIZES SUCH A CLAIM IN A NON-EXCLUSIVE, DUPLICATIVE SUIT BASED ON MERE GOVERNMENTAL *INACTION* IN ZONING WHICH DID NOT DEPRIVE CHESTERFIELD VILLAGE OF ALL USE AND ECONOMIC VALUE OF ITS PROPERTY, AND CHESTERFIELD VILLAGE FAILED TO PLEAD FACTS UPON WHICH RELIEF COULD BE GRANTED.

Palazzolo v. Rhode Island, ___ U.S. ___, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001)

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Marvin E. Nieberg Real Estate Company v. St. Louis County, 488 S.W.2d 626 (Mo. 1973)

Greene v. St. Louis County, 327 S.W.2d 291, at 299 (Mo. 1959)

Constitution of Missouri, Article I, Section 26

III

THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN DISMISSING COUNT III OF THE FIRST AMENDED PETITION, WHICH ALLEGED THAT THE CITY=S FAILURE TO REZONE THE SUBJECT PROPERTY EFFECTED A TEMPORARY REGULATORY TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN THAT 42 U.S.C ' 1983 DOES NOT AUTHORIZE SUCH A CAUSE OF ACTION FOR DAMAGES BASED ON MERE GOVERNMENTAL *INACTION* IN ZONING WHICH DID NOT DEPRIVE CHESTERFIELD VILLAGE OF ALL USE AND ECONOMIC VALUE OF ITS PROPERTY, AND CHESTERFIELD VILLAGE FAILED TO PLEAD FACTS UPON WHICH RELIEF COULD BE GRANTED.

Scott v. City of Sioux City, Iowa, 736 F.2d 1207 (8th Cir. 1984)

Kaiser Development Company v. City and County of Honolulu, 649 F.Supp. 926 (D.Hawaii 1986), *affirmed* 898 F.2d 112 and 913 F.2d 573 (9th Cir. 1990)

First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987)

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)

Constitution of the United States, Amendment V

Constitution of the United States, Amendment XIV
42 U.S.C. ' 1983

IV

THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN DISMISSING THE ACTION ALTOGETHER, IN THAT THERE ARE MULTIPLE GROUNDS TO SUPPORT THE DISMISSAL FOR FAILURE TO STATE ANY CLAIM UPON WHICH RELIEF CAN BE GRANTED, INCLUDING (a) THE BAR OF *RES JUDICATA*, BECAUSE THE SUBJECT MATTER OF CHESTERFIELD VILLAGE=S PRESENT CLAIMS IS THE SAME AS THAT OF THE EARLIER FINAL JUDGMENT IN THE CASE BETWEEN THE SAME PARTIES AND ARISES OUT OF THE SAME ALLEGED ZONING INACTION BY THE CITY, AND (b) CHESTERFIELD VILLAGE=S LACK OF STANDING TO SUE, BECAUSE IT SUFFERED NO COGNIZABLE INJURY OR DAMAGES ONCE IT REALIZED THE FULL ECONOMIC VALUE OF THE PROPERTY BY SALE AFTER THE REZONING OCCURRED AND BEFORE IT FILED THIS ACTION.

Farm Bureau Town and Country Insurance Company of Missouri v. Angoff, 909 S.W.2d 348 (Mo. banc 1995)

King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, 821 S.W.2d 495 (Mo. banc 1991)

Fleming v. Mercantile Bank & Trust Company, 796 S.W.2d 931 (Mo.App.W.D. 1990)

Palazzolo v. Rhode Island, ___ U.S. ___, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001)

ARGUMENT

(a) STANDARD OF REVIEW ON ALL POINTS

THE TRIAL COURT=S DECISION GRANTING A MOTION TO DISMISS THE PLAINTIFF=S PETITION SHOULD BE SUSTAINED ON ANY GROUND WHICH SUPPORTS THE MOTION, ABSENT AN ABUSE OF DISCRETION OR AN ERRONEOUS DECLARATION OR APPLICATION OF THE LAW, WHILE TESTING ONLY THE SUFFICIENCY OF THE PETITION, GRANTING ITS BROADEST INTENDMENT, ASSUMING THAT ALL ITS FACTUAL AVERMENTS ARE TRUE, AND CONSTRUING IT LIBERALLY AND FAVORABLY TO THE PLAINTIFF TO DETERMINE WHETHER ITS AVERMENTS INVOKE PRINCIPLES OF SUBSTANTIVE LAW ENTITLING THE PLAINTIFF TO RELIEF.

A trial court=s order of dismissal of an action on a motion at the pleading stage will be upheld if there is any meritorious ground to support the dismissal, regardless of whether the trial court relied on that ground or specified it in the decision. When the trial court does not specify its reasons for dismissing a petition, the appellate courts will presume it acted for one of the reasons stated in the motion to dismiss. Farm Bureau Town and Country Insurance Company of Missouri v. Angoff, 909 S.W.2d 348, at 351 (Mo. banc 1995)**;** City of Chesterfield v. DeShetler Homes, Inc., 938 S.W.2d 671, at 673 (Mo.App.E.D. 1997). The decision to dismiss will be sustained Aunless there is an abuse of discretion or an erroneous

declaration or application of the law.@ St. Charles County v. City of O=Fallon, 972 S.W.2d 327, at 328 (Mo.App.E.D. 1998), *citing* Murphy v. Carron, 536 S.W.2d 30, at 32 (Mo. banc 1976).

A motion to dismiss a petition tests only the sufficiency of the petition itself, while granting its broadest intendment, assuming that all its properly pleaded factual averments are true, and construing it favorably to the plaintiff to determine whether those averments invoke substantive principles of law which entitle the plaintiff to relief. Farm Bureau Town and Country Insurance Company of Missouri v. Angoff, *supra***;** Nazeri v. Missouri Valley College, 860 S.W.2d 303, at 306 (Mo. banc 1993). However, the court does not accept mere conclusions or speculation on the part of the pleader. Tolliver v. Standard Oil Company, 431 S.W.2d 159, at 162-163 (Mo. 1968)**;** Baugher v. Gates Rubber Company, Inc., 863 S.W.2d 905, at 907, 914 (Mo.App.E.D. 1993)**;** Layman v. Uniroyal, Inc., 558 S.W.2d 220, at 223 (Mo.App.K.C. 1977).

I

THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN DISMISSING COUNT I OF THE FIRST AMENDED PETITION, WHICH ALLEGED THAT THE CITY=S FAILURE TO REZONE THE SUBJECT PROPERTY EFFECTED A TEMPORARY REGULATORY TAKING WITHOUT JUST COMPENSATION, IN THAT MISSOURI LAW RECOGNIZES NO SUCH CAUSE OF ACTION BASED ON MERE GOVERNMENTAL *INACTION* IN ZONING WHICH DID NOT DEPRIVE CHESTERFIELD VILLAGE OF ALL USE AND ECONOMIC VALUE OF ITS PROPERTY, AND CHESTERFIELD VILLAGE FAILED TO PLEAD FACTS UPON WHICH RELIEF COULD BE GRANTED.

This is actually a simple case, which the Court can easily determine under existing precedents**;** and those precedents require the affirmance of the Circuit Court=s dismissal. Chesterfield Village and its *amicus curiae* have attempted to complicate the issues and introduce irrelevant concepts to make the case seem more substantial than it is. However, no amount of trendy allusion to cutting-edge Aproperty rights@ or Apartial, temporary, regulatory taking@ theories, is really pertinent to this appeal. Whatever one may think about those theories--derived from cases of an altogether different nature, in other places and contexts, with distinguishable facts--none of them can transform this stale, long-since-resolved zoning dispute into a lucrative new cause of action for Chesterfield Village.

The well-established, controlling law is that mere governmental ***inaction*** by refusal to rezone property--which is all that Chesterfield Village has alleged in this case--does ***not*** give rise to a claim for either taking or inverse condemnation. Marvin E. Nieberg Real Estate Company v. St. Louis County, 488 S.W.2d 626 (Mo. 1973)**;** Ressel v. Scott County, 927 S.W.2d 518 (Mo.App.E.D. 1996). Moreover, AEven a zoning regulation which significantly limits a tract=s development does not constitute a taking so long as it does not extinguish the fundamental attributes of ownership.@ Longview of St. Joseph, Inc. v. City of St. Joseph, 918 S.W.2d 364 (Mo.App.W.D. 1996). The holdings of these cases properly required the Circuit Court to dismiss Appellant=s Atemporary regulatory taking@ claim outright.

What is true under Missouri law with regard to permanent takings is equally true under the Constitution of the United States where the alleged Ataking@ was admittedly just a Atemporary@ state of affairs. First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). The Supreme Court of the United States held in First English that a plaintiff may recover damages as just compensation for a temporary regulatory taking, if a newly enacted regulation deprives the plaintiff of all economically beneficial use of its land for a Aconsiderable period of years@. *Id.* at 482 U.S. 321-322. An integral portion of the holding is that the regulation must deprive the plaintiff of ***all*** economically beneficial or productive use of the property. This requirement is cited and mirrored by the Supreme Court=s subsequent holding in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, at 1030, footnote 17, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

Lucas plainly states that a regulation depriving a property owner of all economically beneficial or productive use of property constitutes a regulatory taking. The holding of Lucas was that the property owner was deprived of Aall economically beneficial use of the property@ because he was prohibited from ***all*** construction and development on the property, a Atotal taking.@ *Id.* at 505 U.S. 1015. Lucas, in turn, substantially conforms in this regard to the Supreme Court=s earlier decisions in both Penn Central Transportation Company v. New York City, 438 U.S. 104, at 127-128 and 137, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), and Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d106 (1980), which preceded the First English decision, *supra*.

The Supreme Court has once again affirmed the same principle just this year, in Palazzolo v. Rhode Island, ___ U.S. ___, 121 S.Ct. 2448, at 2464, 150 L.Ed.2d 592 (2001), where it held that a regulation Apermitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property >economically idle=@ nor deprive it of Aall economically beneficial use.@ The Adevelopment value@ of the property for such a single residence was only $200,000 in Palazzolo, yet the Supreme Court denied that it was merely Aa token interest.@ In the present case, Chesterfield Village has admitted that without the zoning change it sought and finally received, it could have built up to 15 houses on lots of three or more acres within the 46.3 acre tract (L.F. 6, && 9-10). As this Court is undoubtedly aware, the City of Chesterfield is located in a prime area of west St. Louis County where new houses on three-acre lots routinely sell for more than half a million dollars. Therefore, it is clear that there has been no compensable taking of the tract at all.

The Palazzolo case appears to distinguish between the type of claims which were presented in Lucas, *supra*, where a regulation Adenies all economically beneficial or productive use of land@ and those involved in Penn Central, supra, where the regulation Aplaces limitations on land that fall short of eliminating all economically beneficial use,@ in which event Aa taking nonetheless may have occurred, depending on a complex of factors including the regulation=s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-based expectations, and the character of the government action.@ Palazzolo, *supra*, 121 S.Ct. at 2457. Lucas involved the total prohibition of development on empty beachfront property, whereas Penn Central involved only the restriction of certain uses of air rights above an existing landmark building which remained commercially active. Palazzolo suggests that the two types of claims may require courts to engage in somewhat different processes of analysis. But with regard to the issue before this Court in the present case, the holdings of Lucas and Penn Central are identical**:** Unless there is a Acomplete destruction@ of whatever portion of the landowner=s property interest is affected, there is not a Ataking.@ Penn Central, *supra*, 438 U.S. at 127-128.

Moreover, the Acharacter of the government action@ to which Penn Central refers must be an affirmative act, and not the A>consequential incidence= of a valid regulatory measure,@ much less governmental *inaction* such as a refusal to rezone. *See* Armstrong v. United States, 364 U.S. 40, at 48-49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)**;** Marvin E. Nieberg Real Estate Company, *supra*, 488 S.W.2d at 629-631**;** Ressel, *supra*, 927 S.W.2d at 520-521.

The Supreme Court noted in Lucas, *supra*, that it is Athe government=s power to redefine@ the range of interests included in the ownership of property which is subject to constitutional limitations, while recognizing that Athe Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by ... >existing rules or understandings=@. *Id.* at 505 U.S. 1014, 1030. But there is no Federal or Missouri authority for the proposition that the continuing existence of a zoning classification, which was not improper at its inception, can amount to a taking of property. AWe merely hold that where the government=s activities have *already* worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.@ First English, *supra*, 482 U.S at 321 [emphasis added].

It is clear that the Supreme Court is reluctant to attribute takings of property to the ordinary process of zoning. AA >taking= may more readily be found when the interference with property can be characterized as a physical invasion by government, ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.@ Penn Central, *supra*, 438 U.S. at 124. AA zoning ordinance which substantially advances legitimate governmental goals of protecting residents from the ill effects of urbanization and assures a city=s orderly development and which is applied reasonably and fairly does not give rise to a >takings= claim, especially when the landowner is not prevented from developing the land in other ways.@ Longview of St. Joseph, Inc., *supra* , 918 S.W.2d at 372, *citing* Agins, *supra*.

The Supreme Court has never departed from its general approval of the right of communities to enact and enforce zoning ordinances, which dates from Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). The Court has always regarded zoning not as the deprivation of an individual property owner=s rights to develop its own land at the expense of all others in the vicinity, but instead as a useful means to assure the Aaverage reciprocity of advantage@ protecting the values of all neighboring properties and of the municipality as a whole--unless the zoning produces an Aextraordinary circumstance when *no* productive or economically beneficial use of land is permitted@. Lucas, *supra*, 505 U.S. at 1017 [emphasis in original], 1024**;** Penn Central, *supra*, 438 U.S. at 139-140 (Rehnquist, J., dissenting)**;** *citing* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, at 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

Missouri courts have adopted the same factors as the Supreme Court of the United States in making the determination of whether a taking has occurred under Article I, Section 26 of the state Constitution in connection with a municipal exercise of the police power. Schnuck Markets, Inc. v. City of Bridgeton, 895 S.W.2d 163, at 167-168 (Mo.App.E.D. 1995), *citing* Penn Central, *supra***;** Clay County v. Harley and Susie Bogue, Inc., 988 S.W.2d 102, at 106-107 (Mo.App.W.D. 1999), citing Agins, Lucas, Penn Central and First English, *supra*. But, as the Western District of the Missouri Court of Appeals acknowledged in the Clay County case, *supra*, while in Missouri Athese standards have been applied where the regulatory taking which did not deny the landowner all use of the property, i.e. the partial

regulatory taking, was permanent [citing the Longview of St. Joseph and Schnuck cases, *supra*] ... Missouri has not squarely addressed whether a cause of action for a temporary partial regulatory taking exists and if so, what standards apply.@

Contrary to the arguments of Chesterfield Village in its brief, the Clay County case itself did not hold that such a cause of action for a Atemporary partial regulatory taking@ exists in Missouri, either. The Court of Appeals in Clay County dismissed the appeal because the trial court=s order on the taking question was not a final judgment on all issues, including the extent of the landowners= damages, if any. The opinion=s observations on the taking question were therefore purely *dicta*, and, on the remand of the case, the trial court found against the landowners. No. CV 196-2686-CC, Circuit Court of Clay County, Missouri (December 14, 2000), 15 M.L.W. 97 (January 15, 2001) (*see* Appendix, *infra*). Thus, Clay County is not in any way authority supporting Chesterfield Village=s claim.

At any rate, by requiring that a property owner allege and prove that it was deprived of all economically beneficial use of the land, First English, *supra*, imposed the same standard for temporary as for permanent regulatory takings. It explicitly stated as its rationale that Atemporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.@ *Id.* at 482 U.S. 321. Even there, however, the Supreme Court of the United States emphasized that it was not authorizing such compensation Ain the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.@ *Id.; see also* Agins v. City of Tiburon, *supra*, 447 U.S. at 263,

which holds that AMere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay@ cannot be considered a taking.

Those Anormal delays@ are all that Chesterfield Village faced in this instance. Litigation to resolve a zoning dispute is hardly uncommon. It is certainly contemplated by the statutes of Missouri, which provide for it in great detail. In fact, for many developer-litigants it is just part of their regular negotiation process with a municipality. It would be absurd to contemplate that every rezoning which requires a lawsuit could give rise to a Atemporary regulatory taking@ claim. If such were the case, developers would have a tremendous A*in terrorem*@ weapon to hold over the heads of every municipality: AGrant us every last point of the zoning we want, right now, or you=ll risk paying for it later.@

In fact, Chesterfield Village=s position in this case is profoundly threatening to the very idea of zoning. It would raise the specter of litigation for a Atemporary regulatory taking,@ and monetary damages, against every community, every time a landowner does not obtain the exact zoning classification, permits and conditions the landowner desires. And if one landowner does obtain the rezoning it seeks, against the protests of adjacent landowners who claim it will devalue their own property, the municipality could then face Ataking@ claims from *them*. Municipalities would inevitably be intimidated from exercising their valid police power to zone property under those conditions. Without zoning, municipal self-government itself would lose one of its most essential purposes, and one of its chief sources of public support. That result cannot be justified in terms of either public policy or constitutional law.

By claiming that a Ataking@ occurred when the City denied its first petition to rezone the property, Chesterfield Village is asking this Court to alter the long-standing and well-reasoned policy in Missouri--and the entire country--that landowners are themselves responsible for obtaining any needed changes in zoning which they might desire. Allowing a taking claim here would effectively shift that burden to the cities and counties charged with zoning and planning, by exposing them to suit for a temporary taking any time they turn down (or even fail to initiate) a Agrandiose development proposal@ [Palazzolo, *supra*, 121 S.Ct. at 2458] by guessing wrong and deciding the exact use proposed is not appropriate for the parcel. Under Chesterfield Village=s theory, any land which is zoned incorrectly or in a holding pattern is a ticking time bomb for a zoning authority. As Professor Mandelker of Washington University School of Law has stated, AIf First English applies to cases like this, as well as to cases where a court has found a taking, the opportunities to assert temporary takings claims will be substantially expanded. A temporary taking will occur in any case in which a state court holds a refusal to approve the development of land was unauthorized or arbitrary.@ D. Mandelker, Federal Land Use Law, Release No. 14 (2001).

Such a change, if it comes at all, should be made by the legislature and not by courts. Missouri=s zoning law, like that of all other states, is based on the Standard Zoning Enabling Act proposed by the United States Department of Commerce in the mid-1920s. The Act set up a process whereby low-density residential areas (as Chesterfield and its predecessor St. Louis County were until recently) adopt zoning that does not allow intense land

development. AThis practice allows localities to adopt a >wait and see= zoning system in which developers must secure a major zoning change before they can develop their land. Because almost all development requires a zoning change, the >wait and see= approach allows local zoning agencies to exercise considerable control over the land development process.@ D. Mandelker, Land Use Law, ' 4.15 (1997). The protest provisions set forth in Section 89.060, R.S.Mo., which had required a supermajority of the City Council to approve Chesterfield Village=s petition for rezoning because of nearby landowners= protest, themselves derive from the Standard Zoning Enabling Act. *Id.* at ' 4.18.

In the original proceeding which resulted in the 1996 Circuit Court ruling, Chesterfield Village and its principals candidly admitted that lengthy negotiations had taken place between themselves and the City regarding the precise number of homes to be allowed on the 46.3 tract of land. Residents and nearby landowners did not want to see the land used as a dense subdivision in Chesterfield Village=s proposed R-3 classification with 10,000 square-foot lots, although half-acre zoning with a planned environmental unit (PEU), or R-2 zoning with a PEU, might have been possible instead of the ANU@ classification. *See* L.F. 6, && 7, 10; L.F. 10-11, && 33-35; L.F. 24-25, && 28, 44, 45; L.F. 78. In fact, Chesterfield Village admitted (in Plaintiff=s Opposition to Defendant=s Motion to Dismiss, L.F. 100) that it Ahad no idea at the time of its original lawsuit that it would eventually obtain zoning substantially similar to that it had requested prior to the original lawsuit.@ But when it became dissatisfied with the negotiations, it chose to file suit instead of complying with the

City=s request for a proposal with a few less homes on the tract. Now, however, Chesterfield Village seeks to profit from that choice not to continue to work constructively with the City.

The City therefore respectfully suggests to the Court that this case presents an opportunity to clarify the law of takings with a bright-line rule in the context of zoning. It will be appropriate for the Court to hold that the concept of Atemporary partial regulatory taking@ is simply inapplicable where a municipality has declined to rezone property until compelled by a judicial decision to do so. The concept should be reserved for other, **Aextraordinary@** situations which more closely resemble a conventional taking of the title to property, in which the constitutional requirement of just compensation prevents the government from Aforcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.@ Armstrong, *supra*, 364 U.S. at 49.

One relevant example of such Ataking@ is a regulation which effectively appropriates private interests for public use without formally taking title to them, as in Lucas, *supra*, 505 U.S. at 1010, 1022, where the landowner was forbidden to develop his coastal land in order to preserve a beach from erosion as a Apublic resource,@ or in Mahon, *supra*, where the owner of mineral rights was forbidden to remove them in order to prevent subsidence of the surface. Another is the imposition of an unconstitutional condition on a development permit, which effectively requires the landowner to dedicate part of his property to the public, as in Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). A Ataking@ might also occur where the regulation is not a conventional use of the zoning power,

but a disguised attempt to further an ulterior, perhaps improper purpose. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999). None of those examples, however, corresponds to the present case.

The worst thing that can be said regarding the City=s refusal to rezone Chesterfield Village=s property from its original, ANU@ non-urban classification until the 1996 ruling of the Circuit Court was that the City was mistaken. But a zoning mistake is not a taking. Under Missouri law, courts are entitled to make determinations that the zoning of particular parcels of land is Aunreasonable@ or Aarbitrary@ on the whole record. They are, in effect, empowered to re-evaluate the balance of private and public interests involved, notwithstanding the formal presumption of validity of a municipality=s Alegislative@ acts in the zoning of the property. If the courts do conclude that such zoning is wrong, they call it a constitutional violation of (substantive) *due process*, under Article I, Section 10 of the Constitution of Missouri and the Fifth and Fourteenth Amendments to the Constitution of the United States. Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963). That is what the Circuit Court found in the 1996 Chesterfield Village case. It phrased its findings in terms of due process of law, although its decision was, objectively, a policy decision about the wisdom of the City=s classification of the tract. (L.F. 27, & 9.) But, in any event, it did *not* find that the ANU@ zoning amounted to a taking of Chesterfield Village=s property.

The Circuit Court=s dismissal of the action was therefore correct and should be affirmed. Chesterfield Village, its *amicus* Pacific Legal Foundation, and the Court of Appeals=s now-superseded panel opinion of May 9, 2001, have advanced a variety of

arguments to overturn the dismissal, but none of those arguments is valid. The City will address them briefly, but all in light of the initial observation of this Argument, that the case is really a simple one which does not need to be overcomplicated by strained interpretations of immaterial citations.

A. Missouri law does not recognize a cause of action for a temporary regulatory taking, and Chesterfield Village=s First Amended Petition did not adequately plead facts to support such a cause of action. None of the cases cited by Chesterfield Village actually supports its claim, even to the extent that they recognize a cause of action for Aregulatory taking@ as a general principle. Schnuck Markets, *supra*, was not a zoning case, but rather involved a valid noise ordinance under the city=s police power. Harris v. Missouri Department of Conservation, 755 S.W.2d 726 (Mo.App.W.D. 1988), *appeal after remand* 895 S.W.2d 66, at 73 (Mo.App.W.D. 1995), was not a zoning case, either, but an ultimately unsuccessful inverse condemnation suit in which the state had exercised a valid public interest in designating a lake on the landowner=s property Awaters of the state,@ thereby preventing commercial fishing on it but not denying **Aall** economic use@ of the property. Clay County, *supra*, was a zoning case, but, as shown at page 27 above, it does not aid Chesterfield Village. Martin v. City of Washington, 848 S.W.2d 487 (Mo. banc 1993), a tort case involving sovereign immunity, is not even remotely pertinent to the situation here and does not show that Chesterfield Village has pleaded sufficient facts to avoid dismissal.

B. There is no Atemporary regulatory takings@ doctrine providing Chesterfield Village a cause of action for the City=s refusal to rezone its property. The cases Chesterfield Village cites from outside Missouri are not in point, for they do not pertain to refusals to rezone under conditions like those involved in this case. Steel v. Cape Corporation, 677 A.2d 634 (Md.Ct.Spec.App. 1996), and Corrigan v. City of Scottsdale, 720 P.2d 513 (Ariz. banc 1986), involved refusals to rescind zoning provisions that were *newly* applied incorrectly to the landowners= property, rather than the simple continuation of prior long-standing zoning like the ANU@ classification involved here. The same was true of Standard Materials, Inc. v. City of Slidell, 700 So.2d 975, at 984 (La.App. 1997), whose *dictum* that AA governmental taking may occur in the form of zoning or rezoning@ does not, in any event, refer to governmental **inaction** in the form of a refusal to rezone.

Fitzgarrald v. City of Iowa City, 492 N.W.2d 659 (Iowa 1992), also involved only new zoning regulations rather than a refusal to rezone, and found no taking of the plaintiffs= property where they continued to have an economically viable use for it, albeit one whose value was diminished to some extent by the regulations. Bayside Warehouse Company v. City of Memphis, 470 S.W.2d 375 (Tenn.App. 1971), merely invalidated new zoning, rather than allowing a Ataking@ cause of action for damages for refusal to rezone. MC Properties, Inc. v. City of Chattanooga, 994 S.W.2d 132, at 136 (Tenn.App. 1999), reviewed and **upheld** a denial of rezoning, and found no taking under the existing regulations because Athe property owners, while not receiving the most beneficial use of their property, do have a

beneficial use.@ Layne v.City of Mandeville, 633 So.2d 608 (La.App. 1993), and Zealy v. City of Waukesha, 548 N.W.2d 528 (Wisc. 1996), also did not involve refusals to rezone.

Thus, Chesterfield Village=s claim has no actual foundation in precedent anywhere.

C. There are no valid public policy grounds to permit a Atemporary regulatory taking@ claim for a refusal to rezone. The Apublic policy@ grounds Chesterfield Village cites are largely noncontroversial, but immaterial to the issues of this case. They support the concepts of reasonable zoning and compensation for Atakings,@ of course, but they provide no basis to conclude that a simple refusal to rezone is a compensable Atemporary regulatory taking@ even when it is eventually disapproved by a court. They certainly do not validate Chesterfield Village=s assertion that such a cause of action already exists.

The creation of a new cause of action for damages associated with improper zoning would indeed be an unsupportable innovation, if this Court were to sanction it in such general terms. As Chesterfield Village would have it, every landowner dissatisfied with the zoning of his own--or, for that matter, his neighbor=s--property at any time would be able to sue for at least a Atemporary regulatory@ taking. This is not and cannot be the law.

Chesterfield Village=s Substitute Brief argues at page 42 that AThe City of Chesterfield, and other municipalities in St. Louis County, consistently seek to avoid having to make unpopular zoning decisions and instead place that burden on the St. Louis County Circuit Courts.@ That uncomplimentary generalization is, in the first place, totally outside the record of this case. In the second place, it is a disingenuous way of saying that municipalities respond to the democratic process and listen to their own citizens= wishes for

local development, rather than rolling over and playing dead for developers. In the third place, the developers rather than the municipalities are the parties who choose to place a Aburden@ on the courts by filing suits over zoning decisions. That Aburden@ will only increase if even a refusal to rezone is held to create an actionable Atemporary regulatory taking.@ Finally, the argument is absolutely untrue. The municipalities do in fact negotiate with developers over the terms of proposed rezonings and permits, as the City did here, even prior to the 1996 Circuit Court decision. But when a developer like Chesterfield Village will not settle for anything less than the exact zoning it wants, and insists on filing suit, the mere fact that a court then orders the municipality to Aplace a reasonable zoning classification@ (L.F. 27) on the property should not give rise to a Atemporary regulatory taking@ claim.

Chesterfield Village cites a *dictum* from Elam v. City of St. Ann, 784 S.W.2d 330, at 337 (Mo.App.E.D. 1990), suggesting that the analysis of Aconstitutional taking claims@ and Adue process challenges to the validity of applied zoning ordinances@ is virtually indistinguishable. But it omits the language in Elam which precedes and follows that *dictum*: AHowever, we have found no instance in which the application of a zoning ordinance has been found to require compensation in Missouri. ... Moreover, we understand our Southern District colleagues= skepticism whether inverse condemnation may ever result from the application of a Missouri zoning law.@ *Id.* at 337, *citing* Marvin E. Nieberg Real Estate Company, *supra*, and D & R Pipeline Const. Co. v. Greene County, 630 S.W.2d 236 (Mo.App.S.D. 1982). ASince there is no absolute right to have property zoned for its most valuable commercial use, zoning does not constitute a compensable taking merely because

it prohibits such use.@ Elam, *supra*, 784 S.W.2d at 338. Neither Elam nor anything in the Circuit Court=s 1996 Adue process@ decision supports a Ataking@ cause of action here.

D. Inasmuch as the property in question was already zoned ANU@ when Chesterfield Village purchased it, the refusal to change that zoning did not frustrate any legitimate investment-backed expectations or create a right to compensation. There is direct Missouri precedent on this point, in Elam, *supra*: AFurthermore, when the Elams purchased their property in 1981, it was zoned residential. The Elams, thus, cannot forcefully argue that this residential zoning frustrates a legitimate investment backed expectation.@ *Id.* at 338. Nothing in the recent Palazzolo case, *supra*, changes that conclusion. Palazzolo allowed a landowner who acquired property after the questioned zoning was put into effect standing to sue, but found no taking of his property. Moreover, the facts of Palazzolo were quite different from those involved here, for Chesterfield Village, unlike the Palazzolo plaintiff, does not contend that its property=s original ANU@ zoning was unreasonable *ab initio*. It claims only that later changes in the development pattern of the surrounding area required a corresponding change in the zoning of its own tract. Permitting a latecoming purchaser (which Chesterfield Village admits it was) to maintain a Ataking@ cause of action under those circumstances would go far beyond Palazzolo as well as Elam.

E. It was insufficient for Chesterfield Village to plead the conclusion that a refusal to rezone its property denied it Aall economically beneficial or productive use,@ where its First Amended Petition pleaded specific facts showing the substantial value

of the property for ANU@ residential use under the existing zoning classification. Not only do courts not accept mere conclusions or speculation on the part of a pleader, Tolliver v. Standard Oil Company, *supra*, 431 S.W.2d 159 (Mo. 1968), and Baugher v. Gates Rubber Company, Inc., *supra*, 863 S.W.2d 905 (Mo.App.E.D. 1993), they recognize that ASpecific allegations limit and control general allegations in determining the sufficiency of a petition@, Cassel v. Mercantile Trust Company, 393 S.W.2d 433, at 439 (Mo. 1965) and that Aa pleader may literally plead himself out of court, and when facts constituting a defense affirmatively appear on the face of the petition, the defense may be interposed by motion to dismiss,@ Household Finance Company v. Avery, 476 S.W.2d 165, at 168 (Mo.App.Spr. 1972). Chesterfield Village has pleaded itself out of court by specifically alleging that the ANU@ zoning classification allowed it to develop up to 15 single-family residences on the tract (L.F. 6, && 9-10)--a complete contradiction of its conclusory allegations that such zoning denied it Aall economically beneficial or productive use@ (L.F. 12, & 41), or Aall reasonable and economic use@ (L.F. 14, & 53), or Aall economically viable use@ (L.F. 16, & 63) of the tract. It has alleged no cause of action which can entitle it to relief, as a matter of law, under Penn Central, Agins, Lucas, First English, Elam, Marvin E. Nieberg Real Estate Company, Longview of St. Joseph, Inc. and Palazzolo, *supra*, or any other authority.

Even to permit this clearly insufficient action to go forward from the pleading stage would have the consequence of exposing every municipality in the future to similar costly, complex, constitutional Ataking@ litigation over every land use decision--or non-decision--

which displeases a property owner. The Circuit Court was correct to dismiss the First Amended Petition outright. Its judgment should be sustained.

F. The Pacific Legal Foundation *amicus* brief states no adequate ground to sustain the Atemporary regulatory taking@ claim of Chesterfield Village. The Foundation, of course, is an advocate for constitutional property rights generally, and as such its brief indicates a considerable hostility toward the concept of zoning in general, as well as the City=s application of it in this instance. Naturally, the Foundation seeks the broadest possible application of the Federal and state constitutional Takings Clauses. But, other than an attempt to cast the supposed facts of the case in the worst possible light (without the benefit of an evidentiary record), its brief adds little to the arguments of Chesterfield Village.

The Foundation seeks to emphasize the Circuit Court=s 1996 findings as a basis for a Atemporary regulatory taking.@ However, those findings do not meet the constitutional standard. The *amicus* brief contrives two arguments, out of context, from the language of Agins, *supra*. It claims a temporary regulatory taking because the City=s refusal to rezone the tract did not Asubstantially advance a legitimate governmental interest@; and that Chesterfield Village adequately alleged the City denied it all Aeconomically viable use@ of its property. But those arguments are insufficient in themselves, separately and combined.

The Circuit Court in 1996 said only that the development pattern around the tract was Aconsistent with residential development as requested in plaintiffs= rezoning petition@ and Ainconsistent with any development permitted pursuant to Chesterfield=s >NU= zoning,@ so that there was Ano public benefit to be derived from a continuation@ of that zoning.

Development under a Azoning classification other than@ the existing one would be Aappropriate@, while the development which could take place under the existing ANU@ classification would be Aneither economically feasible, nor good land use planning@ and thus Ainappropriate@. (L.F. 25, && 38-46.) The court concluded that Ait is not economically feasible to develop the properties for use ... and that the properties are not adaptable for use@ under the ANU@ zoning, and their Ahighest and best use@ would be in conformity with the existing and planned development in the surrounding area. (L.F. 26, && 3, 4.) None of this, however, amounts to a finding or conclusion that the existing zoning, let alone the City=s refusal to change it before the 1996 decision, amounted to a deprivation of Aall economically beneficial use@ under First English, Lucas and Palazzolo, *supra*, or a Acomplete destruction@ of Chesterfield Village=s property interest under Penn Central, *supra*. Chesterfield Village and the Foundation may believe that a landowner should have the constitutional right to maximize the economic return from its property, or to receive compensation from the government to make up for any diminution of it, but the law does not support their position.

The Foundation=s brief suggests that the City delayed rezoning of the tract in question Afrom the time it incorporated in 1988 until the conclusion of@ the 1996 litigation. It apparently seeks to analogize the City=s conduct to the long history of dirty tricks and concealed agendas at issue in City of Monterey, *supra*, and other California zoning disputes. But the City=s action here (*i.e.*, **inaction**) hardly justifies such theatrical indignation. Chesterfield Village itself admits in its First Amended Petition that it did not seek rezoning

until 1994 (L.F. 6, & 7), and does not claim that there was anything wrong with the ANU@ zoning before then. The entire development of the City is, of course, a recent phenomenon.

G. The Court of Appeals= panel opinion was mistaken on the law and contains no valid reason to reverse the Circuit Court=s decision. The decision of May 9, 2001 completely overlooked controlling authority cited by the City, including the Marvin E. Nieberg Real Estate Company and Longview of St. Joseph, Inc. cases, *supra*, supporting outright dismissal of the action. Moreover, while it correctly cited Lucas and Penn Central, *supra*, for the proposition that takings can occur when a regulation causes an invasion of a landowner=s property or denies **all** economically beneficial or productive use of land, and for the factors determining whether such a Aregulatory taking@ has occurred, it seriously misinterpreted First English, *supra*. The Court of Appeals panel in effect read First English as if that case was not a reaffirmation but a departure from the standards articulated in Lucas and Penn Central, in the context of a Atemporary regulatory taking@, when in fact the standard for an alleged regulatory taking is the same whether it is permanent or temporary.

The opinion missed the point of Lucas altogether, not realizing that the property owner there was deprived of Aall economically beneficial use of the property@ because he was prohibited from ***all*** construction and development on the property--a Atotal taking.@ That is the same principle which should apply here. Although no prior Missouri case has ever held to the contrary, the panel relied instead only on the generalization from Harris, *supra*, 755 S.W.2d at 730 (a pre-Lucas, permanent regulatory taking case), that AThere is no litmus test

for determining whether there has been a taking.@ Like Chesterfield Village, the Court of Appeals also cited the *dicta* from Clay County, *supra*, that AMissouri has not squarely addressed whether a cause of action for a temporary regulatory taking exists, and if so, what standards apply.@ But it appears not to have realized that any such standards could not depart from those set by First English, Lucas, Penn Central and Agins, *supra*. Claiming to follow the holdings of First English, Lucas and Penn Central, in reality it did not do so.

Most importantly, the Court of Appeals stated that Chesterfield Village Ahas averred facts, which if proven true, could establish a temporary regulatory taking@, when Aliberally construed,@ because it Aavers in its petition that the City=s refusal to rezone deprived [it] of all of the economically beneficial or productive use of the parcel as it was not economically feasible to develop the parcel under the NU classification.@ But, as shown above, the allegation that the City=s inaction deprived Chesterfield Village of Aall@ of the economically beneficial or productive use of the parcel does not plead a fact. It is merely a legal conclusion, and an inaccurate one under the law established in First English, Lucas, Penn Central and Palazzolo, *supra*. Liberal construction of conclusory allegations cannot alter their true nature.

The facts here simply do not fit the Lucas or First English pattern, and they are even less supportive of a taking claim than Palazzolo. Chesterfield Village was never prohibited from all construction or development on the tract at issue. It was always entitled to build as many as 15 houses on that 46.3 acre tract, even under the ANU@ zoning classification.

Therefore, this Court should wholly disregard the opinion of the Court of Appeals and affirm the Circuit Court=s judgment dismissing Count I of the First Amended Petition for failure to state a claim upon which relief can be granted.

II

THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN DISMISSING COUNT II OF THE FIRST AMENDED PETITION, WHICH ALLEGED THAT THE CITY=S FAILURE TO REZONE THE SUBJECT PROPERTY RESULTED IN AN INVERSE CONDEMNATION WITHOUT JUST COMPENSATION, IN THAT NEITHER ARTICLE I, SECTION 26 OF THE MISSOURI CONSTITUTION NOR ANY OTHER PROVISION OF LAW RECOGNIZES SUCH A CLAIM IN A NON-EXCLUSIVE, DUPLICATIVE SUIT BASED ON MERE GOVERNMENTAL *INACTION* IN ZONING WHICH DID NOT DEPRIVE CHESTERFIELD VILLAGE OF ALL USE AND ECONOMIC VALUE OF ITS PROPERTY, AND CHESTERFIELD VILLAGE FAILED TO PLEAD FACTS UPON WHICH RELIEF COULD BE GRANTED.

Chesterfield Village=s purported inverse condemnation claim in Count II fails for the same substantive reasons as its Atemporary regulatory taking@ claim in Count I. Inasmuch as there has not been a deprivation of ***all*** economically beneficial or productive use of the property, the inverse condemnation claim fails the tests of Palazzolo v. Rhode Island, *supra*, ___ U.S. ___, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), Lucas v. South Carolina Coastal Council, *supra*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), First English Evangelical Lutheran Church v. Los Angeles County, *supra*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), Penn Central Transportation Company v. New York City, *supra*, 438

U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), Agins v. City of Tiburon, *supra*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d106 (1980) and Longview of St. Joseph, Inc. v. City of St. Joseph, *supra*, 918 S.W.2d 364 (Mo.App.W.D. 1996).

Challenging only the City=s *inaction* in failing to rezone the property, the inverse condemnation claim also fails to meet the standards of Marvin E. Nieberg Real Estate Company v. St. Louis County, *supra*, 488 S.W.2d 626 (Mo. 1973), Ressel v. Scott County, *supra*, 927 S.W.2d 518 (Mo.App.E.D. 1996), Elam v. City of St. Ann, *supra*, 784 S.W.2d 330 (Mo.App.E.D. 1990), and D & R Pipeline Const. Co. v. Greene County, *supra*, 630 S.W.2d 236 (Mo.App.S.D. 1982), as well as the policy considerations noted by Professor Mandelker, *supra*, which are applicable under Missouri=s legislation based on the Standard Zoning Enabling Act. Nothwithstanding the isolated *dicta* of one Federal District Court in Wintercreek Apartments of St. Peters v. City of St. Peters, 682 F.Supp. 989 (E.D.Mo. 1988), a case cited in Chesterfield Village=s brief (which, like the Florida and California cases it also cited, involved newly imposed zoning and the denial of building permits rather than failure to rezone at the landowner=s request), there has never been such a thing as an inverse condemnation for refusal to rezone in Missouri**;** and this is certainly not an appropriate case to create a new remedy of that character. But in addition to the substantive deficiency of the purported inverse condemnation claim, it must fail for procedural reasons as well.

The claim for inverse condemnation is barred because--as shown on the face of the First Amended Petition (L.F. 7, **&** 18)--Chesterfield Village had already elected the different remedies of declaratory and injunctive relief in its prior lawsuit against the City. Greene v.

St. Louis County, 327 S.W.2d 291, at 299 (Mo. 1959), holds that the doctrine of election of remedies applies where either equitable relief or damages are available to a litigant; and Chesterfield Village--having already chosen equitable relief--thereby gave up its right to damages for the same cause of action. "A cause of action which is single may not be split and filed or tried piecemeal, the penalty for which is that an adjudication on the merits in the first suit is a bar to a second suit." King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, 821 S.W.2d 495, at 501 (Mo. banc 1991).

In the now-superseded Court of Appeals opinion, the panel entirely overlooked the holding in Greene, *supra*, although it stated in passing that "if recovery is available at all, [Chesterfield] Village must elect a remedy" as between Count II for inverse condemnation and Count I for a temporary regulatory taking. While of course there could not be a double recovery for the same injury or damage, that is a wholly different matter from the election of remedies issue which the City had actually raised by its motion to dismiss the purported inverse condemnation cause of action for failure to state a claim upon which relief can be granted (L.F. 61, 66-67). The Court of Appeals evidently misunderstood the nature of the City's election of remedies argument.

Chesterfield Village, too, misses the point when it argues that it could not have brought the inverse condemnation claim at the time of the original action because the claim was not yet "ripe." Its argument is based on the theory that the *amount* of its damages was uncertain until the City's eventual post-judgment rezoning of the property was complete. However, that argument contradicts itself. On one hand, Chesterfield Village contends it has

adequately alleged that the refusal to rezone deprived it of Aall reasonable and economic use of the tract@ (L.F. 14, & 53) even before the 1996 Circuit Court decision. On the other hand, if the illegality of the zoning and its claimed damages were truly undeterminable until some time *after* that decision, they must not have included a total loss of the property=s value.

In any event, Palazzolo, *supra*, appears to foreclose any argument that the damage claim (if there were any such valid claim) was not Aripe@ by the time the 1996 judgment established that the ANU@ zoning classification was unreasonable. If there was indeed a completed taking at the time of the refusal to rezone, the damages would have been the complete loss of the property=s value for the period from the date of the refusal through the date of the 1996 judgment; and the value of the Atemporary taking@ could have been determined with precision at that time. Chesterfield Village=s argument implies that it had no idea itself of the extent of invalidity of the ANU@ zoning and the value of the tract, until it decided after the 1996 judgment what zoning classification it would finally accept from the City. But a party=s uncertainty in the computation of its damages does not mean they were nonexistent until some later date. ADamages are >capable of ascertainment= ... when the agreed party first realizes that it will sustain damages. ... The term is held to refer to the fact of damage, not the precise amount. ... The test is to >ascertain the time when plaintiff could have first maintained the action to a successful result.=@ Polytech, Inc. v. Sedgwick James of Missouri, Inc., 937 S.W.2d 309, at 311-312 (Mo.App.E.D. 1996).

The Circuit Court=s judgment dismissing Count II of the First Amended Petition for failure to state a claim upon which relief can be granted was correct and should be affirmed.

III

THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN DISMISSING COUNT III OF THE FIRST AMENDED PETITION, WHICH ALLEGED THAT THE CITY=S FAILURE TO REZONE THE SUBJECT PROPERTY EFFECTED A TEMPORARY REGULATORY TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN THAT 42 U.S.C ' 1983 DOES NOT AUTHORIZE SUCH A CAUSE OF ACTION FOR DAMAGES BASED ON MERE GOVERNMENTAL *INACTION* IN ZONING WHICH DID NOT DEPRIVE CHESTERFIELD VILLAGE OF ALL USE AND ECONOMIC VALUE OF ITS PROPERTY, AND CHESTERFIELD VILLAGE FAILED TO PLEAD FACTS UPON WHICH RELIEF COULD BE GRANTED.

There is clear, governing law, directly on point, which disallows Chesterfield Village=s purported 42 U.S.C. ' 1983 claim. That law, set out in Scott v. City of Sioux City, Iowa, 736 F.2d 1207 (8th Cir. 1984), *cert. denied* 471 U.S. 1003 (1985), and Kaiser Development Company v. City and County of Honolulu, 649 F.Supp. 926 (D.Hawaii 1986), *affirmed* 898 F.2d 112 and 913 F.2d 573 (9th Cir. 1990), *cert. denied* 499 U.S. 947, 954 (1991), establishes outright that there can be no valid claim, under the Federal civil rights statute, of the character alleged by Chesterfield Village in this case. Any theory that the City

somehow violated Chesterfield Village=s vested rights by its zoning decision Ais a matter of state law not actionable under 42 U.S.C. ' 1983.@ Scott, *supra*, 736 F.2d at 1216-1217, footnote 12. Moreover, even if such a claim existed, it could not properly be adjudicated unless and until the allegedly injured party had exhausted its compensation remedies under state law. *See* Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, at 186, 194-195, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Chesterfield Village has cited in Point II of its brief, but not Point III, the case of New Port Largo, Inc. v. Monroe County, 873 F.Supp.633 (S.D.Fla. 1994), *affirmed* 95 F.3d 1084 (11th Cir. 1996), *cert. denied* 521 U.S. 1121 (1997), which relied explicitly on the exhaustion of state remedies requirement in Williamson County to deny relief under 42 U.S.C. ' 1983.

If the Federal courts do not recognize such ' 1983 claims, neither should this Court. Certainly there is no reason to allow such a cause of action in this case, where Chesterfield Village is still pursuing its claims to Ataking@ and Ainverse condemnation@ remedies by Counts I and II, which are stated directly under the Aself-executing@ provisions of the Federal and Missouri constitutional Taking Clauses. *See* First English Evangelical Lutheran Church v. Los Angeles County, *supra*, 482 U.S. 304, at 315, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); Harris v. Missouri Department of Conservation, *supra*, 755 S.W.2d 726, at 731 (Mo.App.W.D. 1988). Count III is superfluous as well as invalid.

At any rate, Chesterfield Village=s purported ' 1983 claim in Count III fails for the same substantive reasons as its Atemporary regulatory taking@ claim in Count I and its

Ainverse condemnation@ claim in Count II. Inasmuch as there has not been a deprivation of ***all*** economically beneficial or productive use of the property, all of Chesterfield Village=s claims fail the tests of Palazzolo v. Rhode Island, *supra*, ___ U.S. ___, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), Lucas v. South Carolina Coastal Council, *supra*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), First English, *supra*, Penn Central Transportation Company v. New York City, *supra*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), Agins v. City of Tiburon, *supra*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d106 (1980) and Longview of St. Joseph, Inc. v. City of St. Joseph, *supra*, 918 S.W.2d 364 (Mo.App.W.D. 1996)**;** and, since Chesterfield Village challenges only the City=s *inaction* in failing to rezone the property, the claims also fail to meet the standards of Marvin E. Nieberg Real Estate Company v. St. Louis County, *supra*, 488 S.W.2d 626 (Mo. 1973), Ressel v. Scott County, *supra*, 927 S.W.2d 518 (Mo.App.E.D. 1996), Elam v. City of St. Ann, *supra*, 784 S.W.2d 330 (Mo.App.E.D. 1990), and D & R Pipeline Const. Co. v. Greene County, *supra*, 630 S.W.2d 236 (Mo.App.S.D. 1982).

Chesterfield Village has no right to relief of any kind under the circumstances of this case. It received all the relief it ever needed and would ever be entitled to receive when the Circuit Court decided the 1996 case and the City immediately followed that decision by enacting new zoning ordinances permitting the development of the property. Only greed and, perhaps, the desire to intimidate the City in future zoning controversies prompted Chesterfield Village to seek cumulative remedies in 1999, three years after the fact.

Therefore, the Circuit Court=s judgment dismissing Count III of the First Amended Petition for failure to state a claim upon which relief can be granted was correct and should be affirmed.

IV

THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN DISMISSING THE ACTION ALTOGETHER, IN THAT THERE ARE MULTIPLE GROUNDS TO SUPPORT THE DISMISSAL FOR FAILURE TO STATE ANY CLAIM UPON WHICH RELIEF CAN BE GRANTED, INCLUDING (a) THE BAR OF *RES JUDICATA*, BECAUSE THE SUBJECT MATTER OF CHESTERFIELD VILLAGE=S PRESENT CLAIMS IS THE SAME AS THAT OF THE EARLIER FINAL JUDGMENT IN THE CASE BETWEEN THE SAME PARTIES AND ARISES OUT OF THE SAME ALLEGED ZONING INACTION BY THE CITY, AND (b) CHESTERFIELD VILLAGE=S LACK OF STANDING TO SUE, BECAUSE IT SUFFERED NO COGNIZABLE INJURY OR DAMAGES ONCE IT REALIZED THE FULL ECONOMIC VALUE OF THE PROPERTY BY SALE AFTER THE REZONING OCCURRED AND BEFORE IT FILED THIS ACTION.

The Circuit Court=s order and judgment dismissing this action stated that it sustained the City=s Motion to Dismiss for the reason that Chesterfield Village=s petition failed to state a claim upon which relief could be granted. (L.F. 115.) This ruling was correct in itself, but,

in addition, the law is clear that dismissal of an action on a motion at the pleading stage will be upheld if there is any meritorious ground to support the dismissal, regardless of whether the trial court relied on that ground or specified it in the decision. Farm Bureau Town and Country Insurance Company of Missouri v. Angoff, *supra*, 909 S.W.2d 348, at 351 (Mo. banc 1995)**;** City of Chesterfield v. DeShetler Homes, Inc., *supra*, 938 S.W.2d 671, at 673 (Mo.App.E.D. 1997). The City=s motion to dismiss and supporting memorandum of law raised and argued the additional grounds of *res judicata* and lack of standing (L.F. 61, 67-71), which constitute further valid reasons to uphold the judgment of dismissal.

(a) *RES JUDICATA* AND CLAIM PRECLUSION.

As indicated above, in the City=s argument on Point Relied On II, Chesterfield Village has pleaded itself out of court by admitting in its First Amended Petition that it had already elected the different remedies of declaratory and injunctive relief in its prior lawsuit against the City. (L.F. 7, **&** 18.) Under the principles of Greene v. St. Louis County, *supra*, 327 S.W.2d 291 (Mo. 1959), and King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, *supra*, 821 S.W.2d 495 (Mo. banc 1991), it is barred from relitigating the same underlying facts to obtain cumulative relief.

The City understands that other *amici curiae*, the Missouri Municipal League and St. Louis County Municipal League, will file a brief in support of the City=s position on the *res judicata* issue. Those *amici* will undoubtedly emphasize the negative policy implications for all municipalities in this state--and for the public--if every successful lawsuit against a government, on every conceivable issue affecting someone=s property rights, would permit

the winner to initiate an independent, follow-up damages action, claiming the government had perpetrated a Atemporary regulatory taking,@ Ainverse condemnation,@ or some other violation of constitutional rights. If Chesterfield Village prevails here, the City is equally concerned that it will face an unending succession of lawsuits like this in the future.

Moreover, public policy in general disfavors the burdensome relitigation of claims, particularly stale and dubious ones, and as such it applies with special relevance to strained, purported causes of action like those of Chesterfield Village here against the City. The doctrine of *res judicata* and the rule against splitting a cause of action Aare closely related because both are designed to prevent a multiplicity of lawsuits.@ Lay v. Lay, 912 S.W.2d 466, at 471-472 (Mo. banc 1995). Municipalities are protected against most claims altogether by sovereign immunity under Section 537.600, R.S.Mo., although inverse condemnation actions are an exception in instances where actual takings have occurred. Tierney v. Planned Industrial Expansion Authority of Kansas City, 742 S.W.2d 146, at 155 (Mo. banc 1987). Settlements are favored in the law. Stephenson v. First Missouri Corporation, 861 S.W.2d 651, at 657 (Mo.App.W.D. 1993). While the agreement of Chesterfield Village and the City immediately after the April 1996 judgment--resulting in amended ordinances which allowed the development of the tract in question--may not have constituted a formal accord and satisfaction, it should have resolved all disputes between the parties, and this Court should be reluctant to hold it did not.

This was never anything more than a typical land use case. The landowner sought to use the land in a manner not contemplated by its existing zoning. In such cases, if suit is

necessary at all, there are available alternatives for the action. One is a petition for declaratory judgment and injunction, seeking to hold the municipality=s zoning on the site is invalid, to enjoin its enforcement, and thereby to compel the municipality to exercise its legislative power by rezoning the property to a reasonable classification. That was the course of action Chesterfield Village chose in its original lawsuit. Another alternative available **at the same time** was to seek a ruling from the Circuit Court that the City=s actions amounted to a full inverse condemnation of the property or a Atotal taking@ without just compensation, requiring damages under the Takings Clauses of the United States and Missouri Constitutions. Chesterfield Village chose *not* to attempt such claims, even though it is a common practice for landowners to plead not only declaratory judgment and injunction claims but also inverse condemnation and taking claims under both Federal and state law, in the first instance, and then to choose at the appropriate time which theory to submit to the Circuit Court. As shown at pages 44-45 in Point II, *supra*, Aripeness@ has no bearing on this issue. *See, e.g.*, Hoffman v. City of Town and Country, 831 S.W.2d 223 (Mo.App.E.D. 1992)**;** Wells & Highway 21 Corporation v. Yates, 897 S.W.2d 56 (Mo.App.E.D. 1995).

Res judicata applies Anot only to points and issues upon which the court was required by the pleadings and proof to form an opinion and pronounce judgment, but to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.@ King General Contractors, Inc., *supra*, 821 S.W.2d at 501, *citing* the four-part test of Norval v. Whitesell, 605 S.W.2d 789, at 790 (Mo. banc 1980), to determine when *res judicata* applies to a case**:** Athere must

be: (1) Identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; (4) identity of the quality of the person for or against whom the claims are made ... .@

In evaluating the first and second parts of this test, the courts look not only to the remedy, but take a broader view toward the subject matter of the claim and the underlying transaction--Athe aggregate of all the circumstances which constitute the foundation for a claim, counterclaim, etc.@ Fleming v. Mercantile Bank & Trust Company, 796 S.W.2d 931, at 934-935 (Mo.App.W.D. 1990). ASeparate legal theories are not to be considered as separate claims, even if >the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.@ King General Contractors, Inc., *supra*. In the case at bar, there is only one transaction and one set of circumstances at issue, the refusal to rezone the 46.3 acre tract from its ANU@ classification. That transaction and set of circumstances is the identical subject of both Chesterfield Village=s original declaratory judgment and injunction suit and its present claims for damages. The purpose of the third and fourth parts of the Norval test is to ensure that each party has had a full opportunity to be heard on the claims which are precluded from relitigation. All the parties were competently represented in the first action, and indeed Chesterfield Village prevailed there on the merits, obtaining the relief it sought. If it also wished to sue for damages, it had a fair opportunity to present that claim to the Circuit Court at that time. No new facts pertinent to damages occurred after the judgment. All four criteria for *res judicata* are present here.

Under these circumstances, Chesterfield Village=s attempt to reopen this litigation, long after obtaining all the relief it requested in the 1996 case, is merely vexatious and should not be countenanced by the Court. The judgment of dismissal should be affirmed.

(b) CHESTERFIELD VILLAGE LACKED STANDING TO SUE.

Once Chesterfield Village and its principals obtained the zoning they wanted, it did not take them long to find a buyer for the property. As they aver in their First Amended Petition (L.F. 7, & 17), they sold the tract in May 1997 to Taylor-Morley, Inc., a well-known developer. But they have **not** alleged that they lost money on this transaction, nor that they sold the property for anything less than its full market value *as of 1997, with the desired zoning*. Suburban development was proceeding all around them in the Chesterfield area, demand for residential and commercial property was high, and property values were clearly rising rather than falling from 1994 to 1997. Thus, there is simply no basis to conclude that Chesterfield Village failed to receive full compensation for any delay it experienced in obtaining the zoning. It would not need to receive any such compensation from the City, because the buyer paid it the tract=s 1997 value. Its vague averments of damage and loss in the First Amended Petition are inaccurate conclusions, not actionable facts.

Having no damages at the time it filed this lawsuit in 1999, Chesterfield Village has no standing to sue. This Court has held that AStanding is akin to jurisdiction over the subject matter ... As such, the question of a party=s standing can be raised at any time, even *sua sponte*@ by the Court. Standing requires Aa direct, personal stake in the outcome of the action.@ State ex rel. Mathewson v. Board of Election Commissioners, 841 S.W.2d 633, at

634-635 (Mo. banc 1992). AThe party seeking relief must demonstrate that he has a specific and legally cognizable interest in the subject matter of the ... action and that he has been directly and substantially affected thereby.@ Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, at 400 (Mo. banc 1986). One party may not sue for an injury to another, because AIn order to have proper standing, the party seeking relief must show two things: First, ... that he is sufficiently affected by the action he is challenging to justify consideration by the court of the validity of the action, and, second, that the action violates the rights of the particular party who is attacking it and not of some third party.@ Estate of Stroetker v. Caskey, 934 S.W.2d 35, at 36 (Mo.App.E.D. 1996).

Under Palazzolo v. Rhode Island, *supra*, ___ U.S. ___, 121 S.Ct. 2448, at 2462-2464, 150 L.Ed.2d 592 (2001), it would appear that if anyone had standing to sue at the time this case was filed, it would have been Taylor-Morley, Inc., the buyer which paid Chesterfield Village the full 1997 price and value of the property. Chesterfield Village might have had standing to claim damages when it filed the original lawsuit resulting in the 1996 judgment--assuming that it could then have established an actual taking of its property--and thus it could have tried to raise a claim for damages at that time. But in 1999 it was too late.

Therefore, the Circuit Court was correct to dismiss Chesterfield Village=s lawsuit in its entirety. Its judgment should be affirmed with regard to all three Counts of the First Amended Petition.

CONCLUSION

The judgment of the Circuit Court of St. Louis County was correct and should be affirmed in all particulars.

The panel opinion of the Court of Appeals was incorrect on each of the issues of this appeal, and this Court properly granted transfer of the case. Therefore, there is no justification for a retransfer of the appeal to the Court of Appeals nor reinstatement of its opinion, for which Chesterfield Village has prayed in the alternative in the Conclusion to its Substitute Brief herein.

This Court should hold that Chesterfield Village cannot relitigate a case for which it has already obtained a judgment and the precise relief it sought, and cannot sue the City to obtain compensation for the mere inaction of a refusal to rezone that did not amount to either a permanent or temporary, partial or total taking of Chesterfield Village's property.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 84.06

I, Douglas R. Beach, hereby depose and state as follows**:**

1. I am one of the attorneys of record for the Respondent City of Chesterfield, Missouri.

2. I certify that the foregoing Substitute Brief of Respondent City of Chesterfield, Missouri contains 14,669 words and 1,354 lines and thereby complies with the word and line limitations contained in Missouri Supreme Court Rule 84.06(b).

3. In preparing this Certificate, I relied upon the word count function of the Corel Word Perfect 8.0 word processing software.

4. I further certify that the accompanying floppy disk containing a copy of the foregoing Substitute Brief, required to be filed by Missouri Supreme Court Rule 84.06(g), has been scanned for viruses and is virus-free.

_____

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CERTIFICATE OF SERVICE

I, Douglas R. Beach, hereby depose and state as follows**:**

1. I am one of the attorneys of record for the Respondent City of Chesterfield, Missouri.

2. On October 17, 2001, I served two copies of the foregoing Substitute Brief of Respondent City of Chesterfield, Missouri, upon each of the following counsel of record by hand delivery at their addresses as stated below**:**

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